UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

FRY'S ELECTRONICS, INC.

And **Case 32-CA-156938**

ALEXANDER WARNER, an Individual

COUNSEL FOR THE GENERAL COUNSEL'S REPLY TO RESPONDENT'S RESPONSE AND CROSS-MOTION FOR SUMMARY JUDGMENT

On November 24, 2015, the Regional Director for Region 32 of the National Labor Relations Board (the Board) issued and served on Fry's Electronics, Inc. (Respondent) a Complaint and Notice of Hearing in Case 32-CA-156938. On November 27, 2015, the Acting Regional Director for Region 32 of the Board issued an Errata to the Complaint and Notice of Hearing. Thereafter, on December 7, 2015, and January 25, 2016, the Regional Director issued and served an Amended Complaint and Notice of Hearing and Second Amended Complaint and Notice of Hearing, respectively. The Second Amended Complaint alleges that Respondent violated Section 8(a)(1) of the National Labor Relations Act (the Act) by requiring its employees, as a condition of employment, to sign an "Agreement to Arbitrate Disputes Regarding Employment," which was in effect from approximately September 2012 to February 2014 (the 2012 Arbitration Agreement), and the updated "Agreement to Arbitrate Disputes

Regarding Employment," which has been in effect since February 2014 (the 2014 Arbitration Agreement).[1]

On January 29, 2016, Counsel for the General Counsel filed a Motion to Transfer Case to the Board and Motion for Summary Judgment (the Motion). On February 25, 2016, the Executive Secretary, on behalf of the Board, issued an Order to Show Cause as to why the Motion should not be granted. On March 9, 2016, Respondent filed its Response and Cross Motion for Summary Judgment (the Response). In its Response, Respondent concedes that there are no bona fide issues of fact to warrant a hearing before an administrative law judge on the allegations set forth in the Complaint. However, Respondent asserts that *D.R. Horton*, 357 NLRB 2277 (2012), enf. denied in relevant part, 737 F.2d 344 (5th Cir. 2013), and its progeny, were incorrectly decided and should be overturned, and that *D.R. Horton* conflicts with the Federal Arbitration Act (FAA) and the Act. For the reasons set forth below, Respondent's arguments are without merit and Counsel for the General Counsel urges the Board to grant the Motion.

I. Respondent's Arbitration Agreements Violate the Act Under Controlling Precedent Established by *D.R. Horton* and *Murphy Oil*

Respondent's Arbitration Agreements violate Section 8(a)(1) of the Act because they preclude employees from engaging in class or collective legal activity, which are substantive rights protected by Section 7 of the Act. In *Murphy Oil USA, Inc.,* 361 NLRB No. 72 (2014), enf. denied in relevant part, No. 14-60800, 2015 WL 6457613 (5th Cir. 2015), the Board reaffirmed its decision in *D.R. Horton*, and found that arbitration agreements that are imposed as a condition of employment and compel individual arbitration of workplace claims against their employer, require employees to forfeit their substantive rights to act collectively and, therefore, violate

[1] The 2012 Arbitration Agreement and the 2014 Arbitration Agreement are collectively referred to herein as "the Arbitration Agreements."

Section 8(a)(1) of the Act. See Id., slip op. at 2 (2014). The Board explained that while the Act "does not create a right to class certification or the equivalent…it does create a right to *pursue* joint, class, or collective claims if and as available, without the interference of an employer-imposed restraint." Id. (emphasis in original); *D.R. Horton Inc.*, supra; see also *Eastex Inc. v. NLRB*, 437 U.S. 556, 567-68 (1978). In *D.R Horton*, the Board further explained that the "right to engage in collective action—including collective legal action—is the core substantive right protected by the NLRA and is the foundation on which the Act and Federal labor policy rest." *D.R. Horton*, supra, at 2279-80.

Section 8(a)(1) of the Act makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in" the Act. 29 U.S.C. §158(a)(1). In *D.R. Horton*, the Board made clear that "the applicable test is that set forth in *Lutheran Heritage Village,* and under that test, a policy such as Respondent's violates Section 8(a)(1) because it expressly restricts Section 7 activity or, alternatively, because employees would reasonably read it as restricting such activity." *D.R. Horton,* supra, at 2280, citing *Lutheran Heritage Village-Livonia,* 343 NLRB 646 (2004).

In its Response, Respondent claims that *D.R. Horton* and *Murphy Oil* were wrongly decided and relies upon various state and federal court rejection of these cases, including the recent Fifth Circuit decision, which denied enforcement of certain aspects of *D.R. Horton.* See *D.R. Horton v. NLRB*, 737 F.3d 344 (5th Cir. 2013). The Board, however, addressed and rejected these arguments in *Murphy Oil*. See *Murphy Oil*, supra, slip op. at 1-2. Thus, since the Supreme Court has not reversed *D.R. Horton* or *Murphy Oil,* they remain the controlling precedents. In fact, the Board recently reaffirmed the principles set forth in *D.R. Horton* and *Murphy Oil* in *GameStop Corp.,* 363 NLRB No. 89 (2015), and *Waffle House, Inc.*, 363 NLRB No. 104 (2016).

In sum, the Board definitively held in *D.R. Horton* that an employer violates Section 8(a)(1) of the Act "by requiring employees to waive their right to collectively pursue employment-related claims in all forums, arbitral and judicial." *D.R. Horton*, supra, at 2289.[2] In *Murphy Oil*, the Board expressly reaffirmed *D.R. Horton* despite the Fifth Circuit's refusal to enforce the earlier decision and reiterated that these types of agreements unlawfully infringe on employees' Section 7 rights. See *Murphy Oil*, supra, slip op. at 2.

II. *D.R. Horton* and *Murphy Oil* are Consistent with the Policies Underlying the FAA and Other Federal Cases Favoring Arbitration and the Act

Contrary to Respondent's contentions in its Response, the Board's decisions in *D.R. Horton* and *Murphy Oil*, do not present a conflict between the FAA, 9 U.S.C. §1, *et. seq,* and the Act or other court cases upholding arbitration agreements. As the Board in *D.R. Horton* explained, employers violate the Act "by requiring employees, as a condition of employment, to waive their right to pursue collective legal redress in both judicial and arbitral forums accommodates the policies underlying both the NLRA and the FAA to the greatest extent possible." *D.R. Horton*, supra, at 2288. This is because Section 2 of the FAA provides that arbitration agreements may be invalidated in whole or in part for the same reasons any contract may be invalid, including if it is unlawful or contrary to public policy. Id., at 2287. Inasmuch as the Arbitration Agreements here are inconsistent with the Act, they are not enforceable under the FAA.

In *D.R. Horton*, the Board also emphasized that finding an arbitration policy, such as the Arbitration Agreements here, unlawful does not conflict with the FAA because "the intent of the

[2] The Board declined to address whether an employer can lawfully require employees to waive their rights to pursue class or collective action in court at all, so long as employees retain the right to pursue such class claims in arbitration. Id., at 2289, n. 28. This potential exception to the reach of *D.R. Horton* does not apply here, where the Arbitration Agreements do not provide for class arbitration.

FAA was to leave substantive rights undisturbed." Id., at 2286. Although Respondent argues that the Arbitration Agreement does not waive substantive rights, in fact it clearly requires employees to forego substantive rights under the Act—the right to pursue employment-related claims in a collective or class action. The Board has consistently held this to be true. *D.R. Horton*, 357 NLRB 2277, 2286 (2012), enf. denied in relevant part, 737 F.2d 344 (5th Cir. 2013); *Murphy Oil USA, Inc.,* 361 NLRB No. 72, slip op. at 2 (2014), enf. denied in relevant part, No. 14-60800, 2015 WL 6457613 (5th Cir. 2015). Thus, Respondent's Arbitration Agreements are unlawful not because they involve arbitration or specify particular procedures, but rather because they prohibit employees from exercising their Section 7 rights to engage in collective legal activity in *any* forum.

Any argument that Federal District Courts have upheld class action waivers in mandatory arbitration policies is inapplicable here. The interpretation and enforcement of the substantive rights protected by the Act is accorded to the Board, not to the Federal District Courts. As such, it is the Board's decisions in *D.R. Horton* and *Murphy Oil* that are controlling in this case. See *Iowa Beef Packers, Inc.*, 144 NLRB 615, 616-617 (1963). Moreover, contrary to Respondent's claims, finding its Arbitration Agreements unlawful would not run afoul of Supreme Court decisions in *American Express Co. v. Italian Colors Restaurant*, 133 S.Ct. 2304 (2013), *CompuCredit Corp. v. Greenwood*, 132 S.Ct. 665 (2012), and *AT&T Mobility v. Concepcion*, 131 S.Ct. 1740 (2011).

Further, adherence to *D.R. Horton* and *Murphy Oil* does not *compel* class arbitration, and Respondent is free to limit its arbitration program to individual arbitration, so long as employees remain free to exercise their Section 7 right to engage in collective legal activity in court and are not compelled to only act individually. In *D.R. Horton,* the Board held only that employers may

not compel employees to waive their Section 7 rights to collectively pursue legal action of employment claims in *all* forums, arbitral and judicial. *D.R. Horton*, supra, at 2288. Thus, so long as employers leave open a judicial forum for class and collective claims, employees' Section 7 rights are preserved without requiring the availability of class-wide arbitration, and employers remain free to insist that *arbitral* proceedings be conducted on an individual basis. Any such policy would be entirely permissible under the FAA and would not run afoul of *American Express Co.* or *AT&T.* Notably, while *AT&T* makes it clear that bilateral arbitration is *favored* under the FAA, neither of these decisions suggests that it is *compelled*. Thus, any claimed infringement on the FAA by protecting employees' Section 7 rights in these circumstances is entirely illusory.

Moreover, the Court's decision in *American Express* was premised on its conclusion that "[n]o contrary congressional command" required the Court to reject the waiver of class arbitration at issue there, based on its finding that the "antitrust laws do not 'evinc[e] an intention to preclude a waiver of class-action procedure." Id., 133 S.Ct. at 2309 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc.*, 473 U.S. 614, 628 (1985)). The Court further declined to invalidate the arbitration agreement at issue in *American Express* based on the respondent's argument that it prevented the "effective vindication" of a federal statutory right. 133 S.Ct. at 2310-311, citing, *inter alia*, *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991). Based on these findings, the Board's analysis of the Act is properly distinguished from the Court's analysis of anti-trust law. As the Board wrote in *D.R. Horton*,

> The question presented in this case is *not* whether employees can effectively vindicate their statutory rights under the Fair Labor Standards Act in an arbitral forum. See *Gilmer*, supra. Rather, the issue here is whether the MAA's categorical prohibition of joint, class, or collective federal state or employment law claims in any forum directly violates the substantive rights vested in employees

> by Section 7 of the NLRA." *D.R. Horton*, supra, at 2285 (emphasis in original; footnote omitted).

Significantly, *American Express* did not address another basis for invalidating an arbitration agreement raised in *Gilmer*, i.e., where there is an "inherent conflict" between that arbitration and the underlying purposes of another Federal statute. See *Gilmer*, supra at 26 (noting that if Congress intended to preclude a waiver of a judicial forum for ADEA claims, "it will be discoverable in the text of the ADEA, its legislative history, or an 'inherent conflict' between arbitration and the ADEA's underlying purposes"). Accordingly, in applying *Gilmer,* the Board in *D.R. Horton* found that there was an "inherent conflict between the NLRA and the MAA's waiver of the right to proceed collectively in any forum." *D.R. Horton*, supra at 2288. Therefore, *American Express* did not in any way affect the Board's holding in *D.R. Horton*, despite Respondent's claims to the contrary.

In contrast, permitting an employer to require employees to limit their legal claims to individual arbitration vitiates the right to collective action that lies at the heart of the Act. It is axiomatic that an employer cannot force employees to forego that right. It therefore follows that prohibiting employers from doing so protects the values inherent in the Act, without offending those values inherent in the FAA. Expressed another way, requiring an employer to adhere to the Act is entirely consistent with the FAA.

In *D.R. Horton*, the Board held that finding a mandatory arbitration agreement unlawful is "consistent with the well-established interpretation of the [Act] and with core principles of Federal labor policy" and "does not conflict with the letter or interfere with the policies underlying the FAA and, even if it did, that the finding represents an appropriate accommodation of the policies underlying the two statutes." *D.R. Horton*, supra, at 2284, 2288. Initially, the Board noted that: (1) under the FAA, "arbitration may substitute for a judicial forum only so

long as the litigant can effectively vindicate his or her statutory rights through arbitration;" and (2) mandatory individual arbitration agreements prohibit employees from exercising their substantive statutory right to engage in collective legal action. *D.R. Horton*, 357 NLRB 2277, 2285 (2012), enf. denied in relevant part, 737 F.2d 344 (5th Cir. 2013). Thus, the Board emphasized that "nothing in the text of the FAA suggests that an arbitration agreement that is inconsistent with the NLRA is nevertheless enforceable." Id., at 2288. Rather, a refusal to enforce a mandatory arbitration agreement's class action waiver would directly further core policies underlying the Act, and is consistent with the FAA. Id.

Finally, as the *D.R. Horton* Board made clear, even if, contrary to the foregoing, there were an irreconcilable conflict between the Act and the FAA, the Supreme Court has held that when two federal statutes conflict, the later enacted statute, here the Act, must be understood to have impliedly repealed inconsistent provisions in the earlier enacted statute. Id., at 2288, fn. 26.[3]

For the reasons stated here, and for those iterated by the Board in *D.R. Horton* and reaffirmed by the Board in *Murphy Oil*, a finding that the Arbitration Agreements are unlawful under the Act does not pose a conflict with the FAA, and even if there were a direct conflict between the Act and the FAA, the terms of the Norris-LaGuardia Act and the rules of statutory interpretation strongly indicate that the FAA would have to yield. Id., supra, at 2285.

Nor is there any merit to Respondent's assertion that *D.R. Horton* is "in irreconcilable conflict" with the Act because the Act guarantees employees' rights to "refrain from" engaging

[3] While the FAA was reenacted and codified as Title 9 of the United States Code in 1947, both the legislative history and the Supreme Court make clear that the relevant date of enactment is 1925. See, e.g., H.R. Rep. No. 80-251 (1947), reprinted in 1947 U.S.C.C.A.N. 1511 (expressly stating that the 1947 bill made "no attempt" to amend the existing law); H.R. Rep. No. 80-255 (1947) reprinted in 1947 U.S.C.C.A.N. 1515 (same); *Compucredit Corp. v. Greenwood*, 132 S.Ct. 665, 668, (2012) ("the Federal Arbitration Act (FAA), enacted in 1925"); *AT&T Mobility v. Concepcion*, 131 S.Ct. at 1745, 1751 ("[t]he FAA was enacted in 1925," "class arbitration was not even envisioned by Congress when it passed the FAA in 1925"); *Vaden v. Discover Bank*, 129 S.Ct. 1262, 1271 (2009) ("[i]n 1925, Congress enacted the FAA"). The relevant date of enactment for the NLRA is 1935.

in protected activities and employees therefore have a right to resolve an individual dispute with their employer. This logic is flawed. The Board's decision in *D.R. Horton* invalidates mandatory agreements which compel employees to forgo their statutory rights to bring class or collective claims in any forum and which preclude employee access to the Board and its processes. Thus, the *D.R. Horton* ruling *protects* core rights established by the Act, it does not extinguish them.

III. Employees Would Interpret the Arbitration Agreements as Prohibiting Access to the Board

Respondent's argument that the Arbitration Agreements would not be interpreted as precluding or interfering with access to the Board is wholly unsupportable. When work rules and policies, such as those contained in the Arbitration Agreements, are alleged to violate Section 8(a)(1) of the Act, the Board's task is to determine how a reasonable employee would interpret the policy and whether the policy would reasonably tend to interfere with, threaten, or coerce employees in the exercise of their Section 7 rights. See *Cellular Sales of Missouri, LLC*, 362 NLRB No. 27, slip op. at 1, fn. 4 (2015); see also *Lutheran Heritage Village-Livonia*, 343 NLRB 641 (2004).

In *Cellular Sales of Missouri*, the Board found that a work rule that is a condition of employment, such as the Arbitration Agreements here, is unlawful if employees would reasonably believe that it interferes with their ability to file a Board charge or access to the Board's processes, even if the rule or policy does not expressly prohibit access to the Board. *Cellular Sales of Missouri*, supra at 1, fn. 4. Thus, the standard is an objective one and does not require evidence of actual coercion or interference. Moreover, ambiguities in the work rule must be construed against the drafter. See *Supply Technologies, LLC*, 359 NLRB No. 39, slip op. at 3 (2012); see also *Aroostook County Regional Ophthalmology Center*, 317 NLRB 218 (1995).

Here, the Arbitration Agreements initially state that they are not intended to prevent employees from filing complaints with governmental agencies, boards, or other governmental bodies. However, in the next breath they state that employees are "waiving all rights to a court or jury trial and to government administrative process for all disputes" covered by the Arbitration Agreements. While the first sentence seemingly allows employee access to the Board, the second sentence clearly and unequivocally forces employees to waive their right to access the Board and Board proceedings.

Given these conflicting provisions, Respondent's Arbitration Agreements are, at best, ambiguous and confusing as to whether employees are permitted to file charges with the Board, and, at worst, prohibit employees' exercise of these Section 7 rights by making employees believe that they are so restricted. In either case, it is evident that employees would reasonably construe that the Arbitration Agreements require arbitration of NLRA claims and, thus, the Arbitration Agreements discourage employees from utilizing the Board's processes. See also *U-Haul Co. of California*, 347 NLRB 375, 377-78 (2006), end. memo. 255 F. Apex. 527 (D.C. Cir. 2007); *P.J. Cheese, Inc.*, 362 NLRB No. 177 slip op. at 2, fn. 6 (2015); *2 Sisters Food Group*, 357 NLRB No. 168, slip op. at 2 (2011); *Hooters of Ontario Mills*, 363 NLRB No. 2, slip op. at 2 (2015). Therefore, the Arbitration Agreements violate Section 8(a)(1) of the Act because they preclude Respondent's employees from access to the Board.

IV. The Arbitration Agreements' Savings Clauses Do Not Render Them Lawful

In its Response, Respondent further argues that the Arbitration Agreements are lawful based on a savings clause stating that employees are not prohibited from engaging in concerted activity are not subject to discipline for engaging in such activity. Respondent asserts that there can be no violation of Section 8(a)(1) of the Act because of the express language guaranteeing

employees to engage in protected, concerted activity. This argument is without merit. As noted earlier, the Arbitration Agreements violate the Act under controlling Board precedent because the Arbitration Agreements require employees to waive their right to collectively pursue employment-related claims in all forums, arbitral and judicial, and because the ambiguous language of the Arbitration Agreements is reasonably interpreted as precluding employees' access to the Board and its processes. The savings clause does not cure these violations.

In *AWG Ambassador, LLC*, 363 NLRB No. 137 (2016), the Board found that a savings clause, coupled with an express recognition of employee Section 7 rights, in an arbitration agreement did not prohibit a finding that the agreement prohibited employees' Section 7 rights to engage in collective legal action. There, the employer emphasized that its arbitration agreement included an exclusion allowing employees to file charges with administrative agencies, including the Board, as well as an assurance that employees who exercised their Section 7 rights would not be retaliated against. The Board, citing its decision in *SolarCity Corp.*, 363 NLRB No. 83 (2015), rejected the employer's argument that the arbitration agreement did not prohibit employees from collectively pursuing litigation of employment claims in all forums. The Board held that even with the savings provisions, the employer left intact its unlawful restrictions on collective legal activity as to non-NLRA claims and non-administrative agency claims.

As the Board stated in *SolarCity Corp,* slip op. at 2-3, there are a wide-range of employment-related claims that are not within the purview of any administrative agency. For such claims, resort to an administrative agency is meaningless as the agency has no authority to pursue employees' collective claims on their behalf in a judicial forum or anywhere else. The Board also noted that administrative agencies have the discretion to decline to pursue employees' claims for various reasons, including lack of funding to pursue them, and that access to an

agency is not access to a forum for adjudication of employee claims. See also *Countrywide Financial Corp.*, 362 NLRB No. 165 (2015)(rejecting respondent's argument that agreement's clause that "[n]othing in this Agreement shall be construed to require arbitration of any claim if an agreement to arbitrate such a claim is prohibited by law" saved agreement because most nonlawyer employees would be unfamiliar with the limitations of the Act.).

V. Conclusion

For all the above reasons, Counsel for the General Counsel urges the Board to find that *D.R. Horton* and *Murphy Oil* are controlling and that Respondent's maintenance and enforcement[4] of the Arbitration Agreements unduly interferes with employees' freedom of association generally guaranteed under the Act and with employees' rights to file and participate in collective and class litigation, whether the forum for such action be judicial or arbitral, and to pursue claims with the Board, as guaranteed under Section 7 of the Act, in violation of Section 8(a)(1) of the Act, as alleged in the Second Amended Complaint.

DATED AT Oakland, California, this 23rd day of March 2016.

Respectfully submitted,

/s/ Noah Garber

Noah Garber
Counsel for the General Counsel
National Labor Relations Board, Region 32
1301 Clay Street, Suite 300-N
Oakland, California 94612-5224

[4] In its Response, Respondent does not contest its enforcement of the Arbitration Agreements.